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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CANNON & NELMS, APC,

Plaintiff and Respondent,

v.

ST. ANDREWS DEVELOPMENT
CORPORATION,

Defendant and Appellant.

G052813

(Super. Ct. No. 30-2014-00723297)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Gregory H. Lewis, Judge. Reversed and remanded.

Theodora Oringer and Roy Z. Silva for Defendant and Appellant.

Cannon & Nelms, Anthony L. Cannon and Debra K. Cook for Plaintiff and
Respondent.

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INTRODUCTION

Plaintiff, the law firm of Cannon & Nelms, APC (C & N), brought this lawsuit against its former client, St. Andrews Development Corporation (St. Andrews), to recover over \$390,000 allegedly due on unpaid invoices for legal services. C & N moved for summary adjudication of its causes of action for breach of contract, account stated, and services rendered. As evidence in support of the motion, C & N submitted the retainer agreement and attorney declarations stating the invoices had been sent to the client and had not been paid, and calculating the amount of interest due.

C & N did not submit declarations qualifying the invoices as business records under Evidence Code section 1271, verifying as accurate the entries in the invoices, or otherwise describing under oath the professional services rendered, the amount of time spent providing those services, and the attorneys' billing rates. Rather, C & N relied on a provision in the retainer agreement stating that if St. Andrews did not dispute in writing any billing entry within 15 days of receipt of the bill, "all such entries shall be acknowledged as correct, as between us." Based on that provision, the trial court granted summary adjudication of the breach of contract cause of action. The court denied the motion as moot as to the other causes of action.

We conclude the retainer agreement's 15-day dispute provision is unenforceable and reverse summary adjudication of the breach of contract cause of action. We do not address whether the trial court should have granted summary adjudication of the account stated and services rendered causes of action because C & N dismissed them without prejudice.

FACTS

The essential facts are undisputed.

St. Andrews owns The Versailles apartments, consisting of three apartment buildings located at 608, 614, and 620 South St. Andrews Place in Los Angeles. Kayvan

Hakim is one of the three shareholders of St. Andrews. Hakim is also the president of Carnegie Hill Properties, LA (Carnegie), a corporation he created to manage the apartments on behalf of St. Andrews.

In September 2010, the building at 614 South St. Andrews Place was damaged by fire, fire suppression efforts, and, later, by rainwater. Carnegie filed a claim with Travelers Excess and Surplus Lines Company (Travelers), which had underwritten a policy of property insurance insuring St. Andrews's interest in the building. Carnegie sued Travelers in federal court after it failed to pay the claim.

Carnegie was represented in the federal court lawsuit by Attorney Douglas Walsh. In September 2013, Carnegie retained C & N to represent it in place of Walsh. Carnegie entered into a legal services agreement with C & N, called "Letter Agreement for Hourly Rate Fee" (the Retainer Agreement). Hakim signed the Retainer Agreement on behalf of Carnegie. C & N agreed to represent Carnegie "in enforcing and prosecuting, by all appropriate means, claim(s) that Carnegie . . . may have against Travelers . . . for damages sustained by Carnegie . . . due to the failure and/or refusal of Travelers to pay benefits owed to Carnegie . . . under a policy (or policies) of insurance issued by Travelers."

Of particular significance here is section 4 of the Retainer Agreement, entitled "Billings," which provides in relevant part: "We shall bill You for our services and any costs and expenses on a monthly basis and full payment of each of our invoices is due within fifteen (15) days of presentation of the invoice. . . . You agree to notify us promptly, and in writing, if You dispute any entry on such billing; and that if You fail to do so within 15 days after receipt thereof, all such entries shall be acknowledged as correct, as between us."

St. Andrews paid C & N over \$700,000 on invoices for September, October, November, and December 2013. Starting in December 2013, Walsh and representatives of St. Andrews/Carnegie grew concerned over charges for what they

believed to be unnecessary, duplicative, and inefficient work by C & N. In 2014, Hakim called Anthony Cannon, one of C & N's named partners, and complained about the size of the legal bills. Cannon "dismissed" Hakim's complaints and said he knew a "secret way to withdraw from the case." Cannon made similar comments to Jeff Brooks, another representative of St. Andrews/Carnegie.

Shortly before the trial date in the federal court lawsuit, the court conducted a mandatory settlement conference. By that time, the relationship between St. Andrews and C & N had deteriorated to the point that St. Andrews had lost confidence in C & N. Rather than proceeding to trial, St. Andrews accepted \$4.6 million in settlement from Travelers. That amount was not enough to rebuild the apartment building at 614 South St. Andrews Place.

C & N sent three additional invoices: (1) an invoice dated January 30, 2014 in the amount of \$291,628, (2) an invoice dated February 18, 2014 in the amount of \$94,458; and (3) an invoice dated March 12, 2014 in the amount of \$8,069.52. Those invoices have not been paid. No evidence was presented that St. Andrews, Carnegie, or Hakim ever disputed, in writing, any of the entries on the invoices before this litigation commenced.

PROCEDURAL HISTORY

In May 2014, C & N filed this lawsuit against St. Andrews and Carnegie. The third amended complaint asserted four causes of action: (1) breach of contract, (2) account stated, (3) services rendered, and (4) quantum meruit. The complaint sought damages of about \$386,000 representing the unpaid invoice dated January 30, 2014 and the unpaid invoice dated February 18, 2014.

C & N moved for summary adjudication of the breach of contract, account stated, and services rendered causes of action. As evidence in support of the motion, C & N submitted declarations of Cannon, Robert W. Nelms, and Debra K. Cook and

various exhibits. The unpaid invoices were presented as exhibit Nos. 8 and 9 and were authenticated as invoices by the Cannon declaration.

None of the declarations described the work performed by C & N attorneys or verified that the invoices accurately reflected such work. The legal bases for the summary adjudication motion were (1) St. Andrews was the undisclosed principal of Carnegie and therefore liable for the unpaid invoices (not an issue on appeal); and (2) Carnegie did not dispute in writing any of the invoices within 15 days of the date of receipt, as required by the Retainer Agreement.

In opposition to C & N's motion for summary adjudication, St. Andrews submitted declarations from Walsh, Hakim, and Brooks. St. Andrews also submitted a declaration from Gerald G. Knapton, an attorney offering an expert opinion on the reasonableness and value of the work performed by C & N.

The trial court granted summary adjudication of the breach of contract cause of action. The court found, "[t]here are no triable issues of material fact that [C & N] fully performed on the contract and that the defendant breached the contract by failing to fully pay for the services rendered without disputing any billing entries in writing within 15 days of receipt of the invoices." The court concluded the motion for summary adjudication was moot as to the account stated and services rendered causes of action. The court sustained objections to the Hakim, Brooks, and Knapton declarations on the ground of lack of relevance.

C & N dismissed without prejudice the account stated, services rendered, and quantum meruit causes of action as to St. Andrews. In September 2015, judgment was entered in favor of C & N and against St. Andrews in the amount of \$394,155.87 in damages and \$57,003.31 in prejudgment interest. St. Andrews timely filed a notice of appeal from the judgment.

DISCUSSION

I.

Standard of Review and Burden of Proof on Motion for Summary Adjudication

We review orders granting summary judgment de novo. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767. Summary judgment or summary adjudication is warranted if the moving papers establish there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

A plaintiff moving for summary judgment or summary adjudication bears the initial burden of “prov[ing] each element of the cause of action entitling the party to judgment on that cause of action.” (Code Civ. Proc., § 437c, subd. (p)(1).) To meet the initial burden of proof, a plaintiff moving for summary judgment or summary adjudication bears the same burden of proof a plaintiff would have at trial. (*Aguilar, supra*, 25 Cal.4th at p. 851.) Upon meeting that burden, the burden shifts to the defendant “to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.” (Code Civ. Proc., § 437c, subd. (p)(1); see *Aguilar, supra*, at p. 853 [“All that the plaintiff need do is to ‘prove[] each element of the cause of action.’”].)

II.

St. Andrews Forfeited Objections to Declarations and Exhibits Submitted by C & N.

C & N moved for, and the trial court granted summary adjudication of, the breach of contract cause of action. In challenging summary adjudication, St. Andrews

first argues that C & N failed to meet its initial burden of proof because it did not present admissible evidence of services rendered and damages for breach of contract.¹

We would agree, if St. Andrews had properly objected to the declarations and exhibits submitted by C & N. To meet its burden of proof on the elements of performance and damages, C & N submitted the Cannon, Nelms, and Cook declarations, and 14 exhibits, which included the unpaid invoices. An invoice is hearsay and is not admissible to prove the work or services appearing in the invoice were performed, unless a foundational showing is made of an exception to the hearsay rule. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 43; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 87; *In re Leanna W.* (2004) 120 Cal.App.4th 735, 743.) If the proper foundation is laid, invoices are admissible as business records to prove the occurrence of the act, condition, or event recorded in the business record.² (Evid. Code, § 1271; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 320-321.) “Although a bill may evidence the rendition of the services set forth thereon [citation], in order to be competent evidence under [the business records exception to the hearsay rule], it must be supported by the testimony of a witness qualified to testify as to its identity and the mode of its preparation.” (*California Steel Buildings, Inc. v. Transport Indemnity Co.* (1966) 242 Cal.App.2d 749, 759.)

¹ “[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damages to the plaintiff.” (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) C & N had the initial burden of “present[ing] evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not” on each of those elements. (*Aguilar, supra*, 25 Cal.4th at p. 851.)

² Evidence Code section 1271 states: “Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.”

None of the declarations submitted in support of C & N's summary adjudication motion verified that the entries on the invoices accurately reflected work actually performed, the amount of time spent performing those services, and the attorney billing rates. None of the declarants described work performed by the declarant, the amount of time spent on that work, and the declarant's billing rate.

St. Andrews did not, however, object to the declarations and exhibits submitted by C & N in support of its summary adjudication motion. Any objections to the declarations therefore must be deemed forfeited for purposes of appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 531; see Code Civ. Proc., § 437c, subd. (d) [objections to declarations based on lack of personal knowledge or competence must be made at summary judgment hearing]; *Fry v. Pro-Line Boats, Inc.* (2008) 163 Cal.App.4th 970, 974 ["Plaintiff waived any hearsay objection by failing to raise it at trial."].)

III.

The Retainer Agreement's 15-day Dispute Provision Is Unenforceable.

The 15-day dispute provision of the Retainer Agreement is unenforceable. In *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 175, the Court of Appeal addressed the validity of a similar provision in an attorney retainer agreement purporting to require the client to give notice of any dispute of the bills within 10 days of the date the statement was sent. This 10-day notice provision provided that if no timely objection was made, the law firm "shall assume the statement is accurate as presented." (*Id.* at p. 183.)

In *Charnay v. Cobert, supra*, 145 Cal.App.4th at page 173, the attorney demurred to a client's complaint for breach of contract, legal malpractice, breach of fiduciary duty, fraud, and negligent misrepresentation. In sustaining the demurrer without leave to amend, the trial court relied on the 10-day notice provision. (*Id.* at p. 182.) The Court of Appeal concluded such reliance was "unsound" because "[i]f [the

attorney] breached his fiduciary duty by fraudulently billing [the client] for services not performed at all or by using inflated rates for services performed by others, [the client]’s failure to comply with the contractual notice provision does not immunize that breach, which is based on a duty arising from the attorney-client relationship itself and not the retainer agreement.” (*Ibid.*) The court also concluded the notice provision did not purport to limit the client’s right to file a lawsuit for breach of fiduciary duty or breach of contract challenging the fee statements if the client failed to meet the 10-day requirement. (*Id.* at p. 183.) Finally, the court concluded the notice provision, if interpreted as shortening the statute of limitations, would be unreasonable and unenforceable as a matter of law (*ibid.*) and would abrogate the delayed discovery rule with respect to claims of fraudulent billing (*id.* at pp. 183-184).

We agree with *Charnay v. Cobert* and find its conclusion and reasoning applicable to the 15-day dispute provision in the Retainer Agreement. C & N argues *Charnay v. Cobert* is inapplicable because St. Andrews has not asserted professional negligence or breach of fiduciary duty in a cross-complaint or as an affirmative defense. This is a distinction without a difference. The relevant point is that C & N is asserting the 15-day dispute provision against its former client to foreclose any challenge to the invoices or the entries in them.

“The relationship between an attorney and client is a fiduciary relationship of the very highest character.” (*Clancy v. State Bar* (1969) 71 Cal.2d 140, 146.) “This fiduciary duty requires fee agreements and billings “must be fair, reasonable and fully explained to the client.”” No fee agreement ‘is valid and enforceable without regard to considerations of good conscience, fair dealing, and . . . the eventual effect on the cost to the client.’” (*Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 430-431, fn. omitted.) A provision giving a client only 15 days to dispute what might be long and complicated attorney billings does not comport with these fiduciary standards. We do not address whether a much lengthier period of time in which to

dispute attorney invoices might be enforceable. At a minimum, a client should be given enough time not only to meaningfully review and analyze attorney billing statements for accuracy, but also to determine whether, in light of the overall representation, the services rendered were necessary or reasonable. For instance, litigation events occurring after a 15-day window period might show that actions taken by counsel were unreasonable, unnecessary, overbilled, or detrimental to the client's interest.

The trial court granted summary adjudication on the ground that St. Andrews did not dispute the C & N invoices within 15 days of receipt as required by the 15-day dispute provision of the Retainer Agreement. Based on that ruling, the court sustained objections to the Hakim, Brooks, and Knapton declarations solely on the ground of lack of relevance. Because we conclude the 15-day dispute provision in the Retainer Agreement is unenforceable, evidence contesting the validity or reasonableness of the services rendered and fees sought by C & N is potentially relevant. We decline to comment further on the evidence submitted by St. Andrews in opposition to the motion for summary adjudication except to note that expert testimony might be appropriate to assist the court in determining the amount of attorney fees. (See *Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 276.)

IV.

Account Stated and Services Rendered Causes of Action

C & N argues that if we reverse summary adjudication of the breach of contract cause of action, we should affirm summary adjudication of the causes of action for account stated and services rendered. The trial court concluded the summary adjudication motion was moot as to those two causes of action. C & N subsequently dismissed without prejudice the account stated, services rendered, and quantum meruit causes of action as to St. Andrews. Those three causes of action, having been voluntarily dismissed, are not encompassed within the appeal from the judgment. (Cf. *Gutkin v.*

University of Southern California (2002) 101 Cal.App.4th 967, 975 [appellate court lacks jurisdiction to review orders made before voluntary dismissal].)

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings. Appellant shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.